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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SAMUEL EARL JONES, Defendant and Appellant.	B166013 (Los Angeles County Super. Ct. No. YA 052830)

APPEAL from a judgment of the Superior Court of Los Angeles County. Andrew C. Kauffman, Judge. Affirmed.

Jonathan P. Milberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Susan Lee Frierson, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant Samuel Earl Jones appeals from a judgment entered following a jury trial. The jury convicted appellant of violating Penal Code section 273.5, subdivision (a) (corporal injury to a spouse) and Penal Code section 290, subdivision (a)(1)(A) (failing to register as a sex offender).[1] The court found true that appellant had suffered three prior serious felony convictions and sentenced appellant to an indeterminate term of 25 years to life.

Appellant contends that he did not receive a fair trial and was deprived of effective assistance of counsel because the two counts were improperly joined and his trial counsel failed to move for severance; the jury improperly received evidence of prior uncharged incidents of domestic violence without a proper objection from trial counsel; he was improperly impeached with evidence of his prior convictions; and the prosecutor committed misconduct by describing the factual basis of a prior offense. He challenges his sentence on the grounds that there was insufficient evidence to support his prior conviction for assault, that the trial court abused its discretion by declining to strike his prior convictions under section 1385, and his sentence amounts to unconstitutional cruel and/or unusual punishment. We conclude that appellant's trial satisfied constitutional guarantees of due process and that appellant received effective assistance of counsel. We further conclude that there was sufficient evidence on which the court could find appellant's convictions true and find no basis for striking them, and that appellant's sentence is not unconstitutional. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant married Kimberly Bell in 1997 and has resided with her since that time. At approximately 3:00 a.m. on Saturday, August 3, 2002, Bell returned home after celebrating her birthday with some relatives. When Bell went into the bedroom

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[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

to get her pajamas, she and appellant began to argue. As Bell was leaving the bedroom, appellant grabbed her hair and arm, and told her he was "sick" of her. Once the two were in the living room, appellant picked up a wooden shelf kit, which contained wood and screws wrapped in plastic, and repeatedly hit Bell with it. He hit her on her forehead and on her right side, at which point the screws lacerated Bell's right breast. Bell tried to protect herself by crouching on the floor and attempting to crawl away, but appellant stopped her by putting his weight on her and biting her on her back. Appellant stopped attacking Bell when their five-year-old son came into the living room.

Bell tried to leave the house the following day, but appellant prevented her from doing so.

The following Wednesday, August 7, 2002, one of Bell's coworkers convinced Bell to go to the police. On the way to the police station, Bell stopped at her house to retrieve the wooden shelf kit. The wood piece in the kit was split. When Bell arrived at the Lennox Sheriff's station, Los Angeles County Deputy Sheriff Cheryl Martin spoke with Bell and took photographs of her injuries. The photographs showed dark bruises on Bell's chin, right cheek and right forearm, and a large knot on her forehead. They also revealed a two and one-half inch gash on Bell's right breast that appeared to be scabbing over. A portion of the gash resulted in a permanent scar. In addition, Officer Martin photographed a human bite mark on Bell's back that was also scabbing over.

During the first two years of appellant's and Bell's marriage, there was no violence. Then, in 1999, appellant hit Bell with a closed fist, giving her a black eye. In March or April 2001, appellant grabbed Bell's arm during an argument, causing redness and bruising. And in July 2002, appellant and Bell argued, and appellant pushed Bell onto the concrete, causing her to fall and hurt her leg.

In September 1992, before appellant and Bell were married, appellant was convicted of a felony sex offense, for which he is required to register under section

290 for the duration of his lifetime. Appellant registered as a sex offender at least eight times. Appellant was advised of all registration requirements, including that he was required to inform the registering agency of any change of address. For appellant's most recent registration on February 15, 2002, at the Los Angeles Police Department's 77th Street police station, appellant gave as his address 1435 West 60th Street in Los Angeles. This is appellant's sister's address; appellant resided at that address before he married Bell. Since 1997, however, appellant had resided at 1259½ West 87th Street in Los Angeles, which is within the jurisdiction of the Lennox Sheriff's station. Appellant never registered his current address with any law enforcement agency.

A two-count information filed by the District Attorney of Los Angeles County charged appellant in count one with inflicting corporal injury upon the mother of his child (§ 273.5, subd. (a)) and in count two with failing to register as a sex offender (§ 290, subd. (a)(1)(A)). The information further alleged that appellant had sustained three prior serious or violent felony convictions (§§ 667, subds. (a)(1) & (b)-(i), 1170.12, subds. (a)-(d)). Appellant pleaded not guilty to both counts and denied the special allegation. The trial court granted appellant's motion to bifurcate trial on the prior conviction allegations and appellant waived his right to a jury trial on those allegations.

Before the jury trial began, the trial court overruled appellant's objection to the admission of evidence of prior violence between appellant and Bell. After all the evidence had been presented, the court and appellant discussed out of the presence of the jury that appellant wished to waive his right to testify. Once the prosecutor had completed her closing argument, however, appellant advised the court that he had changed his mind and now wanted to testify. The court advised appellant that the prosecutor would be able to impeach his testimony with evidence of his prior convictions. Appellant testified, stating that on Friday, August 2, 2002, he went to bed at approximately 8:30 p.m. The next thing he remembered was that someone touched

him on his back, and reached back and knocked that person into a dresser. The person turned out to be Bell, who was drunk; she then ran into the living and began tearing it up. After that, Bell attacked appellant, knocking him over and hitting him repeatedly. Appellant bit her so that she would get off of him. The trial court thereafter permitted the prosecutor to reopen her closing argument to address appellant's testimony.

The jury found appellant guilty on both counts. The trial court found the prior conviction allegations to be true.

The trial court denied appellant's request to exercise its discretion under section 1385 to dismiss the prior conviction allegations. On counts one and two, appellant was sentenced to state prison for concurrent terms of 25 years to life. Appellant received presentence custody credit of 302 days and was ordered to a pay a $1,000 restitution fine (§ 1202.4, subd. (b)) and a $1,000 parole revocation fine (§ 1202.45), which was stayed pending revocation of parole.

This appeal followed.

DISCUSSION

A. Appellant Received Both a Fair Trial and Effective Assistance of Counsel.

Appellant contends that he was denied a fair trial and/or received ineffective assistance of counsel on the following bases: (1) appellant's trial counsel failed to seek severance of the corporal injury to a spouse and failure to register as a sex offender counts, and appellant suffered prejudice from the joint trial of those counts; (2) the trial court violated appellant's due process rights by admitting evidence of prior acts of spousal battery; (3) the trial court prejudicially erred by admitting evidence that appellant had previously been convicted of rape and by failing to instruct the jury to disregard that evidence; (4) the trial court either failed to exercise its discretion or abused its discretion in admitting evidence of appellant's prior convictions for the purpose of impeachment; and (5) the prosecutor committed prejudicial misconduct by questioning appellant about a prior uncharged offense. We reject appellant's claims.

We conclude that his trial comported with the constitutional guarantees of due process and effective assistance of counsel.

1. The Two Counts Alleged in the Information Were Properly Joined; Appellant Suffered No Prejudice from the Joint Trial of Those Counts; and His Trial Counsel Was Not Ineffective for Failing to Move for Severance of Those Counts.

Appellant's first claim is twofold: (1) The two counts for corporal injury to a spouse and failure to register as a sex offender were improperly joined because they did not meet the requirements of section 954; and (2) he received ineffective assistance of counsel as a result of his trial counsel's failure to seek severance of those counts. We do not find merit in either claim. The two counts were properly joined, and the fact that appellant cannot establish that he suffered prejudice from the joint trial of those counts defeats both aspects of his claim.

Section 954 provides in relevant part: "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts . . . ." The law favors consolidation of charges. (*People v. Ochoa* (1998) 19 Cal.4th 353, 409.) "Joinder of criminal charges for trial benefits the public by reducing delay in the disposition of criminal charges, and it benefits the state by conserving judicial resources and public funds." (*People v. Hill* (1995) 34 Cal.App.4th 727, 735.) Whether offenses are properly joined under section 954 is a question of law which we review de novo. (*People v. Cunningham* (2001) 25 Cal.4th 926, 984.)

Courts have broadly construed the phrase "connected together in their commission" as used in section 954: "[O]ffenses which are committed at different times and places against different victims are nevertheless 'connected together in their commission' when they are . . . linked by a "'common element of substantial importance.'" [Citations.]" (*People v. Lucky* (1988) 45 Cal.3d 259, 276; accord, *People v. Mendoza* (2000) 24 Cal.4th 130, 160; *People v. Miller* (1990) 50 Cal.3d 954,

987.) If the offenses are so connected, joinder is permissible even though the offenses do not relate to the same transaction and may have been committed at different times and places against different victims. (*Aydelott v. Superior Court* (1970) 7 Cal.App.3d 718, 722.)

Illustrating the application of this standard, in *People v. Alvarez* (1996) 14 Cal.4th 155, 188, the court held that the trial court's joinder of rape and vehicle theft counts survived de novo scrutiny where "the rape occurred very close in time and place to the theft of the vehicle, and the theft of the vehicle may have been motivated by a desire to avoid apprehension for the rape." (*Ibid*.) Likewise, in *People v. Valdez* (2004) 32 Cal.4th 73, 119, murder and escape charges were held to share a common element of substantial importance where, although the murder occurred two years before the escape charge, the escape occurred as the defendant was being returned to "lock-up" following his murder charge arraignment and the apparent motive for the escape was to avoid prosecution for the murder. (See also *People v. Stewart* (1985) 165 Cal.App.3d 1050, 1058 [proper to join murder and robbery charges involving different victims where the offenses occurred during a one-month period and therefore grew out of a "continuing and intertwined sequence of criminal activity"]; *People v. De La Plane* (1979) 88 Cal.App.3d 223, 251 [proper to join robbery charge and murder charge occurring 10 months later where the offenses were connected to the extent that the murder victim was originally charged as a codefendant on the robbery charge, and the victim's cooperation with the prosecution provided a motive for the murder].)

On the basis of this authority, we conclude that the charges for corporal injury to a spouse and failure to register as a sex offender were properly joined pursuant to section 954. Indeed, the offenses shared common elements of substantial importance: They occurred at the same location and proof of the offenses rested with the testimony of a single key witness, Bell. These circumstances are unlike those presented in the cases on which appellant relies for his assertion that the counts were improperly

joined. (See *Calderon v. Superior Court* (2001) 87 Cal.App.4th 933, 939-941 [addressing propriety of joining defendants rather than charges]; *Walker v. Superior Court* (1974) 37 Cal.App.3d 938, 941-943 [abuse of discretion to refuse to sever two unrelated charges committed over three months apart where proof of one charge involved highly prejudicial and otherwise inadmissible evidence on the other charge]; *People v. Saldana* (1965) 233 Cal.App.2d 24, 30 [holding that the defendant was not prejudiced by the trial court's failure to sever two unrelated charges].)

Our determination that joinder of the counts in the information satisfied the requirements of section 954 does not end our inquiry: "'The determination that the offenses are "joinable" under section 954 is only the first stage of analysis because section 954 explicitly gives the trial court discretion to sever offenses or counts "in the interest of justice and for good cause shown."' [Citations.]" (*People v. Lucky, supra,* 45 Cal.3d at pp. 276-277.) However, section 954 does not impose a sua sponte duty of severance on trial courts; rather, a defendant must make a showing of good cause in order to obtain severance. (*People v. Maury* (2003) 30 Cal.4th 342, 392.) Trial counsel did not ask the court to exercise its discretion to sever the two counts, and appellant asserts that this failure deprived him of effective assistance of counsel.

The Sixth Amendment to the United States Constitution guarantees competent representation by counsel for criminal defendants. (*Strickland v. Washington* (1984) 466 U.S. 668, 690.) Appellate courts strongly presume that defense counsel in a criminal case "rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions." (*People v. Holt* (1997) 15 Cal.4th 619, 703; see also *People v. Freeman* (1994) 8 Cal.4th 450, 513.) A meritorious claim of constitutionally ineffective assistance must establish that: (1) Counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. (*People v. Holt*, at p. 703; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) "If the defendant makes an insufficient

showing on either one of these components, the ineffective assistance claim fails." (*People v. Holt*, at p. 703.) A reviewing court """need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies."""" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.)

For a defendant to prevail on a claim of ineffective assistance of counsel based specifically on counsel's failure to move for severance, "he must show that reasonably competent counsel would have moved for severance, that such motion would have been successful, and that had the counts been severed an outcome more favorable to him was reasonably probable." (*People v. Grant* (1988) 45 Cal.3d 829, 864-865.) Here, even assuming for the purpose of discussion only that reasonably competent counsel would have moved for severance, appellant cannot meet his burden to demonstrate that he received ineffective assistance of counsel; he cannot demonstrate that a motion to sever would have been successful, nor can he show that a successful motion would have lead to a more favorable outcome.

To have prevailed on a motion to sever, appellant had the burden of demonstrating substantial prejudice requiring that the charges be separately tried. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1315.) While the determination of prejudice is necessarily dependent on the facts of each case, several guiding factors have emerged: "'Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case. [Citations.]'" (*Ibid.*; accord, *People v. Marshall* (1997) 15 Cal.4th 1, 27-28.)

Applying these factors here, appellant would not have been able to demonstrate prejudice. While the People concede that the evidence from the two different offenses was not cross-admissible, "the absence of cross-admissibility does not, by itself, preclude joinder." (*People v. Hill*, *supra*, 34 Cal.App.4th at p. 735, fn. 2 [citing cases]; see also § 954.1 ["In cases in which two or more different offenses of the same class of crimes or offenses have been charged together in the same accusatory pleading, . . . evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together before the same trier of fact"].) Thus, to establish prejudice, a "defendant must show more than the absence of cross-admissibility of evidence." (*People v. Mayfield* (1997) 14 Cal.4th 668, 721.)

Turning to the other factors, neither of the counts was particularly inflammatory in relation to the other. (See, e.g., *People v. Cunningham, supra,* 25 Cal.4th at pp. 984-985 [joinder of felon-in-possession of firearm charge with capital murder charge not inflammatory].) Further, joinder did not involve consolidating a weak case with a strong one; the strength of the proof on each charge did not differ significantly and involved critical testimony from the same witness. (See *People v. Bean* (1988) 46 Cal.3d 919, 939 [weak charge not joined with strong one where there was substantial evidence of the defendant's involvement in each incident, comprised of direct evidence on one charge and circumstantial evidence on the other].) Finally, joinder of the charges did not turn the matter into a capital case, and each charge subjected appellant to the same potential sentence. Against this showing, the benefits to the public of joinder were significant: "Foremost among these benefits is the conservation of judicial resources and public funds. A unitary trial requires a single courtroom, judge, and court attaches. Only one group of jurors need serve, and the expenditure of time for jury voir dire and trial is greatly reduced over that required were the cases separately tried. In addition, the public is served by the reduced delay on disposition of criminal charges both in trial and through the appellate process." (*Id*. at pp. 939-

940.) For these reasons, appellant would not have been able to establish prejudice and the trial court would have acted well within its discretion in denying a motion to sever.

But, even if appellant were able to establish that the motion would have been granted, his ineffective assistance of counsel claim would still fail because he cannot show that there would have been a more favorable outcome. With respect to the charge for corporal injury to a spouse, we reject appellant's argument that a jury would have found appellant's version of his altercation with Bell more credible if it had not learned of his failure to register as a sex offender. Bell's testimony was corroborated both by physical evidence in the form of her injuries and the state of the wood shelf kit, and by other testimony from her coworkers, aunt and a police officer. And as to the charge of failing to register as a sex offender, the documentary evidence as well as the testimony from Bell and appellant would have been no less substantial in the absence of evidence of the spousal battery. Appellant, therefore, cannot demonstrate prejudice from the failure to move for severance, as it is not reasonably probable that appellant would have obtained a more favorable result if his trial counsel had made a motion to sever the two counts.

2. The Trial Court Properly Admitted Evidence of Uncharged Acts of Spousal Battery Pursuant to Evidence Code Section 1109, and Counsel Was Not Ineffective for Failing to Object to the Admission of That Evidence on Due Process Grounds.

The trial court permitted the People to adduce evidence of prior incidents of violence between appellant and his wife. Specifically, Bell testified that in 1999, appellant hit Bell with a closed fist, giving her a black eye. Bell's aunt, Tracy Henry, testified about the same incident, stating that Bell had a black eye when she came to stay with her for a couple of months. Bell also testified that in March or April 2001, appellant grabbed Bell's arm during an argument, causing redness and bruising. At that time, Bell, again, went to stay with her aunt. Henry observed that Bell had a black eye and mark on her arm and testified that Bell told her appellant had beaten her. Bell

further testified that in July 2002, appellant and Bell argued, and appellant pushed Bell to the ground, causing her to hurt her leg. Seneca Hawthorne, one of Bell's coworkers, testified that on several occasions Bell had come to work with bruises, swelling, black eyes and scratches on her arm.

Before trial began, appellant objected to the admission of this evidence on the ground that he had not been provided sufficient written discovery relating to the foregoing incidents. The trial court overruled the objection. On appeal, appellant now contends that the admission of this evidence pursuant to Evidence Code section 1109 violated his due process rights.[2] Appellant waived this claim by not raising it below. (*People v. Catlin* (2001) 26 Cal.4th 81, 122 ["Defendant's contention that the admission of the other-crimes evidence violated his state and federal constitutional right to a fair trial is waived because it was not raised below"].) For this reason, appellant also contends that the failure to object at trial to the admission of this evidence on the ground he now raises constitutes ineffective assistance of counsel. As explained earlier, to prevail on a claim of ineffective assistance of counsel, appellant must show both that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that appellant suffered prejudice—that is, there is a reasonable probability that but for counsel's deficient performance, the result of the proceedings would have been different. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 687-694; *People v. Ledesma, supra,* 43 Cal.3d at pp. 216-218.) Appellant cannot meet his burden to demonstrate the existence of either prong.

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[2] Evidence Code section 1109, subdivision (a)(1) provides in pertinent part: "[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352."

With respect to the issue of counsel's performance, the record is inadequate to evaluate the reasonableness of counsel's actions. Addressing a claim of ineffective assistance of counsel raised on appeal, the court in *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266, stated: "We have repeatedly stressed 'that "[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.'" Appellant argues that because counsel took other steps to prevent the jury from learning about appellant's prior offenses, there could be no satisfactory explanation for her failure to object. We disagree. The record is silent as to why counsel failed to object to the evidence under Evidence Code section 1109. But, the record does indicate that it is possible counsel believed evidence of prior acts would support appellant's defense that Bell's drinking and aggression caused those incidents, or that counsel simply believed such an objection would be futile.

Even if we were to conclude, however, that there could be no satisfactory explanation for counsel's omission, appellant's ineffective assistance of counsel claim still fails. This is because appellant cannot establish a reasonable probability that but for counsel's failure to object, the outcome of his trial would have been any different. Multiple appellate decisions have rejected comparable challenges, expressly holding that Evidence Code section 1109 does not offend due process. (E.g., *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095-1096; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1331-1334; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1025-1030; *People v. Johnson* (2000) 77 Cal.App.4th 410, 416-420.) On the basis of this authority, the trial court would have been obligated to overrule counsel's objection. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["Decisions of every division of the District Courts of Appeals are binding upon all the justice and municipal courts and upon all the superior courts of this state"]; *Shephard v. Superior Court* (1986) 180 Cal.App.3d

23, 29 ["Trial courts are bound by the doctrine of stare decisis to follow controlling reported decisions of the appellate courts of this state"].)

We find no merit to appellant's contention that the trial court would not have been bound to follow this overwhelming authority because it was wrongly decided. Appellant argues that the appellate courts have improperly relied on *People v. Falsetta* (1999) 21 Cal.4th 903 in holding that Evidence Code section 1109 comports with due process. *Falsetta* upheld the constitutionality of Evidence Code section 1108, a statute which permits the admission of a defendant's past sex crimes for the purpose of showing a propensity to commit the same type of offenses. (*People v. Falsetta,* at pp. 913-915.) Appellant contends that the policy considerations which underlie permitting evidence of past sex crimes do not apply to past incidents of domestic violence. To the contrary, the Legislature's primary rationale for enacting Evidence Code section 1108 is an equally applicable justification for Evidence Code section 1109: "As the legislative history indicates, the Legislature's principal justification for adopting section 1108 was a practical one: By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations. Section 1108 provides the trier of fact in a sex offense case the opportunity to learn of the defendant's possible disposition to commit sex crimes." (*People v. Falsetta*, at p. 915.)

In *People v. Brown, supra,* the court explained that the Legislature specifically considered the proof problems apparent in both sex crime and domestic violence cases, and concluded that Evidence Code sections 1108 and 1109 can be read together as complementary portions of the same statutory scheme. (77 Cal.App.4th at pp. 1333-1334.) The *Brown* court quoted a bill analysis which demonstrates that the Legislature intended for the same types of special evidentiary rules to govern both sex crime and domestic violence cases. According to that bill analysis: "'Proponents

argue that in domestic violence cases, as in sexual offense cases, special evidentiary rules are justified because of the distinctive issues and difficulties of proof in this area. Specifically, evidence of other acts is important in domestic violence cases because of the typically repetitive nature of domestic violence crimes, and because of the acute difficulties of proof associated with frequently uncooperative victims and third-party witnesses who are often children or neighbors who may fear retaliation from the abuser and do not wish to become involved.'" (*Id*. at p. 1333; see also *People v. Hoover*, *supra*, 77 Cal.App.4th at pp. 1027-1028 [quoting an Assembly Committee report explaining why a propensity inference is appropriate in domestic violence cases]; *People v. Johnson, supra*, 77 Cal.App.4th at pp. 419-420 [same].) Thus, because Evidence Code section 1108 and 1109 were designed to address the same proof problems, we conclude that appellate courts have properly relied on *Falsetta* to conclude that Evidence Code section 1109 does not violate due process.

In sum, Evidence Code section 1109 authorized the admission of evidence of prior incidents of domestic violence. Any due process objection to that evidence would have been unsuccessful and would not have changed the outcome of the proceedings below.[3]

3. The Trial Court Properly Admitted Evidence of Appellant's Prior Rape Conviction for the Purpose of Impeachment.

Appellant contends that evidence of his prior rape conviction was erroneously admitted because it was irrelevant to any issue in dispute relating to his charges for corporal injury to a spouse and failure to register as a sex offender. But evidence of appellant's prior rape conviction was admitted solely for the purpose of impeachment. (See Evid. Code, § 788 ["For the purpose of attacking the credibility of a witness, it

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[3] In view of our conclusion, we need not, and therefore do not, address the People's argument that the evidence of other domestic violence would have been properly admitted under Evidence Code section 1101, subdivision (b), as demonstrating the absence of mistake or accident.

may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony"]; *People v. Mazza* (1985) 175 Cal.App.3d 836, 844 ["rape is a crime involving moral turpitude"].) The trial court specifically advised appellant that the jury would learn of his prior conviction if he decided to testify, answering "yes" to the prosecutor's question as to whether it was "still the court's intent to allow the People to impeach [appellant] with his prior strike convictions," and explaining to appellant: "Mr. Jones, if you want to testify, you have that right, but the People are going to be permitted to impeach your prior felony conviction [*sic*]." Thus, the trial court properly admitted evidence of appellant's prior rape conviction to impeach appellant's testimony, and there was no basis for the trial court to instruct the jury to disregard that evidence.

4. The Trial Court Properly Exercised its Discretion in Admitting Evidence of Appellant's Prior Convictions for the Purpose of Impeachment.

In a related argument, appellant asserts that the record fails to demonstrate that the trial court engaged in an appropriate exercise of discretion in allowing appellant to be impeached with evidence of his three prior felony convictions. Alternatively, appellant asserts that the trial court abused its discretion by permitting such impeachment. We reject both contentions.

Appellant's first attack is procedural. He contends that the record fails to demonstrate that the trial court engaged in the weighing process required by Evidence Code section 352 when determining to admit evidence of appellant's prior convictions as impeachment. *People v. Castro* (1985) 38 Cal.3d 301, 306, held that the use of a felony conviction involving moral turpitude for the purpose of impeachment is always subject to the trial court's discretion under Evidence Code section 352. In other words, a court may exercise its discretion to bar impeachment with a prior felony conviction if its probative value is substantially outweighed by its prejudicial impact. (*People v. Clair* (1992) 2 Cal.4th 629, 654.) Where Evidence Code section 352 is invoked, "the record must affirmatively show that the trial judge did in fact weigh

prejudice against probative value . . . ." (*People v. Mickey* (1991) 54 Cal.3d 612, 656.) But, "the trial judge need not expressly weigh prejudice against probative value—or even expressly state that he has done so [citation]." (*Ibid*.; accord, *People v. Padilla* (1995) 11 Cal.4th 891, 924, overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; *People v. Johnson* (1987) 193 Cal.App.3d 1570, 1576.)

Here, a minute order shows that on February 18, 2003—the first day of trial—the court and counsel conferred in chambers, off the record. When the case was called, the trial court indicated that it had conducted a trial management conference with counsel. The defense proceeded to address on the record one motion in limine that had already been discussed; at that time, however, there was no discussion concerning the use of appellant's prior convictions for impeachment. After the defense rested, the trial court asked appellant about his decision not to testify to confirm that he understood his rights. During that exchange, defense counsel stated: "Judge, I would like to state for the record that I told Mr. Jones that the court was inclined, if he testified, to allow the People to impeach him with the three prior alleged strike convictions. [¶] In spite of the fact they are over 10-years-old, he is making this decision based on the court's ruling." When appellant changed his mind and decided to testify after the prosecution's opening argument, defense counsel inquired: "Judge, is it still the court's intent to allow the People to impeach him with his prior strike convictions?" The trial court answered affirmatively. Appellant reiterated his desire to testify after the trial court admonished: "Mr. Jones, if you want to testify, you have that right, but the People are going to be permitted to impeach your prior felony conviction [*sic*]."

Preliminarily, we reject appellant's claim to the extent that it is based on appellant's assertion that prejudicial error is shown because the record is insufficient to determine whether the trial court engaged in the balancing required by Evidence Code section 352. "It has long been settled that the burden is on an appellant to affirmatively show in the record that error was committed by the trial court . . . . 'All

intendments and presumptions are indulged to support [a trial court's judgment or order] on matters as to which the record is silent, and error must be affirmatively shown.'" (*People v. Alvarez* (1996) 49 Cal.App.4th 679, 694; see also *People v. Mack* (1986) 178 Cal.App.3d 1026, 1032 ["Appellant has the burden of showing error by an adequate record"].) Here, it is evident from defense counsel's comments that there was some discussion between the trial court and counsel concerning the decision to permit appellant to be impeached with evidence of his prior convictions. As such, appellant had the burden of making these "oral proceedings" available for review by way of a settled statement. (See Cal. Rules of Court, rule 32.2; see also *People v. Pinholster* (1992) 1 Cal.4th 865, 922 [settled statement of unreported bench conferences between court and counsel]; *People v. Holloway* (1990) 50 Cal.3d 1098, 1116 [settled statement of unreported in-chambers discussion between court and counsel], disapproved on another point in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) His failure to do so waives any claim of error related to the trial court's failure to exercise its discretion under Evidence Code section 352.

In any event, we believe that the record adequately demonstrates that the trial court engaged in the balancing process required by Evidence Code section 352. Defense counsel commented that the trial court had already reached the conclusion that evidence of the prior convictions would be admissible despite the fact that they were 10 years old. This comment indicates that there had been some discussion among the trial court and counsel concerning the convictions' probative value versus prejudicial impact. While the record must affirmatively show that the trial court weighed prejudice against probative value when faced with a motion invoking Evidence Code section 352, the California Supreme Court has acknowledged that it is "willing to infer an implicit weighing by the trial court on the basis of record indications well short of an express statement." (*People v. Padilla, supra*, 11 Cal.4th at p. 924.) In this case, the record satisfactorily demonstrates an implicit weighing under Evidence Code section 352. These circumstances are no different than those in

People v. Clarida (1987) 197 Cal.App.3d 547, where trial counsel argued that the court should weigh the probative value of a prior conviction against its prejudicial effect, and the trial court thereafter denied a motion to exclude evidence of the conviction without comment. The appellate court held that the context of the court's ruling demonstrated that trial court engaged in requisite weighing process. (*Id*. at p. 553; see also *People v. Montiel* (1985) 39 Cal.3d 910, 924 [where court denied motion in limine without comment, counsel's argument concerning Evidence Code section 352 deemed sufficient to show that court engaged in weighing process].)

Appellant's alternative argument is substantive—he asserts that even if the court did exercise its discretion under Evidence Code section 352, it abused that discretion by allowing evidence of the prior convictions. Again, we disagree. *People v. Mendoza* (2000) 78 Cal.App.4th 918 outlined the factors that guide a court in exercising its discretion when considering whether to admit evidence of a prior conviction for the purpose of impeachment. The court explained: "In exercising its discretion, the trial court must consider four factors identified by our Supreme Court in *People v. Beagle* (1972) 6 Cal.3d 441, 453 (hereafter *Beagle)*: (1) whether the prior conviction reflects adversely on an individual's honesty or veracity; (2) the nearness or remoteness in time of a prior conviction; (3) whether the prior conviction is for the same or substantially similar conduct to the charged offense; and (4) what the effect will be if the defendant does not testify out of fear of being prejudiced because of the impeachment by prior convictions. [Citation.] These factors need not be rigidly followed. [Citation.]" (*People v. Mendoza*, at p. 925.)

Application of the *Beagle* factors shows that the trial court did not abuse its discretion. (See *People v. Green* (1995) 34 Cal.App.4th 165, 182-183 ["discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered"].) "The first factor goes to admissibility of the prior convictions, which determination the trial court must first reach before exercising its discretion based on the remaining factors." (*Id*. at p. 182.) Appellant's prior convictions met this

threshold standard, as they all involved crimes of moral turpitude. (*People v. Rivera* (2003) 107 Cal.App.4th 1374, 1381 [assault with a deadly weapon]; *People v. Mazza*, *supra*, 175 Cal.App.3d at p. 844 [rape]; *People v. Zataray* (1985) 173 Cal.App.3d 390, 400 [kidnapping].) Moreover, appellant's offenses "necessarily indicate[d] a '"general readiness to do evil"' . . . [and] 'it is undeniable that a witness's moral depravity of any kind has some "tendency in reason" (Evid. Code, § 210) to shake one's confidence in his honesty.'" (*People v. Thornton* (1992) 3 Cal.App.4th 419, 422.) Second, the fact that the convictions were 10 years old did not make them too remote. (See *People v. Turner* (1994) 8 Cal.4th 137, 200 [affirming admission of prior convictions 10 to 13 years old]; *People v. Campbell* (1994) 23 Cal.App.4th 1488, 1497, fn. 14 [10-year-old conviction not too remote in time to be admissible]; *People v. Benton* (1979) 100 Cal.App.3d 92, 97 [sustaining use of conviction at least 11 years old].) Third, the prior convictions involved offenses which were not the same or substantially similar to the charged offenses. And the fourth factor is inapplicable because appellant ultimately chose to testify. An examination of the *Beagle* factors establishes that the trial court's decision to allow evidence of appellant's prior convictions was an appropriate exercise of discretion.

5. Appellant Suffered No Prejudice as a Result of the Prosecutor's Unfinished Question Concerning the Factual Basis of a Prior Offense.

During appellant's cross-examination, the following exchange occurred between the prosecutor and appellant: "Q . . . Back in 1990, when you hit a security guard in the head with a pipe— [¶] A Uh-huh." At that point, the court interrupted and asked counsel to approach the bench. Outside the presence of the jury, the court told the prosecutor that the incident was not an appropriate subject of inquiry under Evidence Code section 1101, subdivision (b), and the issue was never raised again.

Appellant contends that the prosecutor committed prejudicial misconduct by referring to the security guard assault. Preliminarily, we note that this argument has been waived by the absence of any objection below. (E.g., *People v. Morales* (2001)

25 Cal.4th 34, 44; *People v. Clark* (1993) 5 Cal.4th 950, 1016.) But, regardless of whether we couch appellant's claim in terms of ineffective assistance of counsel for failing to object to the prosecutor's comment, or whether we consider the claim on the merits, our conclusion is the same: Appellant's claim fails.

Appellant cannot demonstrate ineffective assistance of counsel because the record sheds no light on why counsel failed to object and there could be a number of satisfactory explanations as to why counsel did not object. (See *People v. Mendoza Tello*, *supra*, 15 Cal.4th at p. 266.) Indeed, counsel reasonably could have determined not to highlight the comment by objecting, or determined that any objection would have been duplicative in light of the trial court's immediate intervention.

Moreover, we cannot find that appellant was prejudiced by the comment, as it is not reasonably probable that the outcome of the proceedings would have been different either had defense counsel objected to the comment or the comment not occurred. (See *People v. Ledesma, supra*, 43 Cal.3d at pp. 216-218 [prejudice standard for ineffective assistance of counsel claim]; see also *People v. Pigage* (2003) 112 Cal.App.4th 1359, 1375 [only prosecutorial misconduct that causes prejudice requires reversal and "[a] violation of state law only is cause for reversal when it is reasonably probable that a result more favorable to the defendant would have occurred had the district attorney refrained from the untoward comment"].) We do not believe that the jury's verdict was in any way affected by the prosecutor's unfinished statement about a previous violent incident, particularly in light of the fact that the jury had just properly learned that appellant had previously been convicted of three violent felonies. (See, e.g., *People v. Brown* (2003) 31 Cal.4th 518, 553-554 [prosecutor's brief and fleeting improper remarks were harmless error where they asserted nothing the evidence did not already suggest]; *People v. Clark*, *supra*, 5 Cal.4th at pp. 1016-1017 [prosecutor's question raising the issue of possible sodomy where the defendant was not charged with sodomy held harmless error where there was little likelihood that the comment was inflammatory given the nature of the other evidence presented].)

B. Substantial Evidence Supported the Trial Court's Finding That Appellant's Prior Conviction for Assault With a Deadly Weapon Was a Serious Felony.

Appellant contends that there was insufficient evidence to support the trial court's implied finding that his prior conviction for assault with a deadly weapon constituted a "serious felony" within the meaning of section 1192.7, subdivision (c). We disagree.

Pursuant to section 667, a prior conviction of a "serious felony" as defined by section 1192.7, subdivision (c), constitutes a "strike" for sentencing purposes under the Three Strikes law. (§ 667, subd. (d)(1).) The information here alleged that appellant had suffered three prior strike convictions and the trial court found that allegation to be true. With respect to the challenged conviction, the evidence on which the trial court based its finding was comprised of an abstract of judgment stating that appellant was convicted of violating "PC 245(a)(1) ASST W/ DLY WPN GBI" and received an enhancement under section 12022, subdivision (b); a fingerprint card stating "CT 2 P245(A)(1) ASSLT W/ FORCE GBI (B) WPN 12022(B) ARMED"; and a booking photograph of appellant.

Relying on *People v. Rodriguez* (1998) 17 Cal.4th 253, appellant contends that this evidence was insufficient to establish that appellant was convicted of a "serious felony" as defined by section 1192.7, subdivision (c)(23), which required personal infliction of great bodily injury or personal use of firearm. In *People v James* (2001) 91 Cal.App.4th 1147, we rejected a similar contention, explaining that in March 2000, the California voters approved Proposition 21, which amended section 1192.7, subdivision (c). "We h[e]ld that if a defendant's current offense was committed on or after the effective date of Proposition 21, a determination whether the defendant's prior conviction was for a serious felony within the meaning of the three strikes law must be based on the definition of serious felonies in Penal Code section 1192.7, subdivision (c), in effect on March 8, 2000." (*People v. James*, at p. 1150.)

Proposition 21 added a definition of assault which effectively modified a portion of the *Rodriguez* decision. (*People v. Luna* (2003) 113 Cal.App.4th 395, 397.) According to section 1192.7, subdivision (c)(31), a "serious felony" now includes "assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm or assault on a peace officer or firefighter, in violation of section 245 . . . ." Applying this definition, the *Luna* court determined that evidence virtually identical to that submitted here constituted substantial evidence of a prior serious felony conviction: "The abstract of judgment and the Department of Corrections fingerprint card references to Penal Code section 245, subdivision (a)(1) and 'ASSLT GBI W/DL WPN' constituted substantial evidence defendant was previously convicted of assault with a deadly weapon; an offense now described in Penal Code section 1192.7, subdivision (c)(31)." (*People v. Luna*, at pp. 398-399.)

We, likewise, conclude that the abstract of judgment's reference to section 245, subdivision (a)(1) and "ASST W/ DLY WPN GBI," together with the fingerprint card's similar references, constituted substantial evidence that appellant was previously convicted of a serious felony as defined by section 1192.7, subdivision (c)(31). Indeed, the evidence submitted here is even more compelling than that in *Luna*, as appellant also received a sentence enhancement under section 12022, subdivision (b), which required a finding that he "personally use[d] a deadly or dangerous weapon in the commission of a felony . . . ." (§ 12022, subd. (b)(1).) This evidence arguably would have established that appellant suffered a prior serious felony conviction even under the more stringent definition of assault applied in *Rodriguez*. (See *People v. Rodriguez*, *supra*, 17 Cal.4th at p. 261.)

Finally, we note that our decision in *Williams v. Superior Court* (2001) 92 Cal.App.4th 612 has no application here. There, we concluded that a prior conviction for assault in violation of section 245, subdivision (a)(1), standing alone, did not constitute a serious felony within the meaning of section 1192.7, subdivision (c)(31). We reached this conclusion because the latter statute provides a more limited

definition of assault than the former. Specifically, a defendant may violate section 245, subdivision (a)(1) by using means of force likely to produce great bodily injury on a civilian, but that violation is not encompassed by section 1192.7, subdivision (c)(31). We concluded that by listing only some of the crimes constituting violations of section 245, subdivision (a)(1), the express language of section 1192.7, subdivision (c)(31), demonstrated "an intention not to incorporate section 245 in its entirety." (*Williams v. Superior Court*, at p. 623; accord, *People v. Haykel* (2002) 96 Cal.App.4th 146, 149-150; *People v. Winters* (2001) 93 Cal.App.4th 273, 279-280.) But, section 1192.7, subdivision (c)(31), does incorporate "assault with a deadly weapon," which is the offense for which appellant suffered a prior conviction. Substantial evidence therefore supported the finding that appellant's prior conviction constituted a serious felony.

C. The Trial Court Acted Within Its Discretion in Declining to Strike Appellant's Prior Convictions, and the Resulting Sentence Did Not Constitute Cruel and Unusual Punishment.

Appellant challenges his sentence of 25 years to life on two separate grounds: (1) The trial court abused its discretion by failing to strike one or more of appellant's prior convictions under section 1385, subdivision (a); and (2) his sentence violates the prohibitions against cruel and/or unusual punishment contained in the federal and state Constitutions. We find that the trial court acted within its discretion in declining to strike any prior convictions that would have affected appellant's sentence, and that the resulting sentence is constitutional.

1. The trial court considered the appropriate factors in refusing to strike appellant's prior convictions.

Section 1385 permits the trial court to dismiss an allegation that a defendant suffered a prior serious felony conviction if the dismissal is "in furtherance of justice." (§ 1385, subd. (a); *People v. Garcia* (1999) 20 Cal.4th 490, 502 [the Three Strikes law "is a scheme that expressly incorporates section 1385, subdivision (a), which

authorizes trial courts to dismiss prior conviction allegations on a count-by-count basis"]; *People v. Williams* (1998) 17 Cal.4th 148, 158 ["a trial court may strike or vacate an allegation or finding under the Three Strikes law that a defendant has previously been convicted of a serious and/or violent felony, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385(a)"]; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530 ["we conclude that section 1385(a) does permit a court acting on its own motion to strike prior felony conviction allegations in cases brought under the Three Strikes law"].) In determining whether to exercise its discretion to strike a defendant's prior serious felony conviction allegation or finding, or in reviewing that exercise of discretion, "the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams*, at p. 161.)

Pursuant to section 1385, appellant requested that the trial court exercise its discretion to strike one or more of his prior serious felony convictions. He asserted the prior convictions should be stricken because one was over 10 years old and two of the convictions arose from a single case. The trial court also received and reviewed appellant's motion and the People's opposition, the probation reports, and communications addressed to court written on appellant's behalf by several individuals. The trial court listened to statements from appellant and his mother, as well as arguments from counsel. Appellant's mother explained that appellant had turned his life around since his prior convictions—he had stopped drinking, had a good job and was a caring father and son. Appellant expressed remorse for his actions and asked the court to order anger management classes or probation.

In ruling on the motion, the court acknowledged that the existence of appellant's support system must be balanced against his prior serious felony convictions, and then explained: "I have to tell you, Mr. Jones, it's too late for [probation]. You are not eligible for probation unless I were to decide that based on your background, character, and prospects, the nature of the current offense, and the prior offenses that I should strike all your strikes. I'm not going to do that. [¶] Now, if you were before me facing sentencing only for failure to register, then we could talk about something less than a sentence of 25 years to life. But you have prior strikes each of which is a crime of violence, and you are before me today for sentencing on a crime of violence and for reasons the jury found to be totally unjustified. [¶] You subjected your wife, somebody who loves you very much, to a rather brutal beating. And from her testimony, it's obvious that this was not the first time she had been a victim of violence at your hands. [¶] If you wanted to attend anger management or to do something relying upon your support system of your family and friends to deal with this issue, then you should have done that yourself. It's too late now to ask for the Court's consent. [¶] I have to say, Mr. Jones, that despite the fact you have the support system that I have mentioned and despite the fact that you have a number of persons who have written letters on your behalf, despite the fact now that you are saying you are sorry my discretion in these cases is very limited, and I do not feel that you are an appropriate candidate for the Court to exercise that discretion, and I will not be doing so."

The trial court's statements demonstrate that it understood the factors it was to evaluate in exercising its discretion and that it carefully considered those factors in declining to strike appellant's prior serious felony convictions. The trial court examined the nature and seriousness of appellant's instant offenses, considered that his prior serious felony convictions involved crimes of violence, and discussed appellant's personal situation and support system, commenting that appellant's desire to obtain assistance with managing his anger came too late. (See *People v. Williams, supra*, 17

Cal.4th at p. 161.) On the record before us, we cannot conclude that the trial court's exercise of discretion was irrational or arbitrary; to the contrary, "the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law . . . ."[4] (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.)

Appellant argues that the trial court abused its discretion, comparing this case to *People v. Cluff* (2001) 87 Cal.App.4th 991. We do not find any valid basis for comparison. There, the appellate court concluded that the defendant should have been treated as if he fell outside the Three Strikes' scheme, because the facts showed: The defendant's only offense was the failure to reregister his current address, it was unclear whether the failure was merely negligent or intentional; the defendant's prior convictions were not for violent felonies; "[t]here was no indication that [the defendant] had reoffended since he left prison in 1990[;] and Dr. Bess believed that 'with probation supervision and participation in a treatment program' Cluff would not reoffend." (*Id.* at p. 1002.) Here, in contrast, appellant did not commit merely a "technical" violation of section 290. Rather, he was also convicted of violating section 273.5 (corporal injury to a spouse) and his prior convictions, likewise, involved violent felonies. Moreover, unlike the defendant in *Cluff*, appellant never registered his current address, even though he had resided there for five years. "'[A] decision to strike a prior is to be an individualized one based on the particular aspects of the current offenses for which the defendant has been convicted and on the defendant's own history and personal circumstances.'" (*People v. Cluff*, at p. 1004.) The distinctly different circumstances presented in *Cluff* cannot assist appellant.

More specifically, appellant contends that the trial court abused its discretion by failing to strike one of appellant's two prior convictions in case No. BA048111,

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[4] We note, as have the parties, that the issue of the appropriate standard of review to apply to a decision declining to strike a prior conviction for purpose of sentencing under the Three Strikes law is currently pending for the California Supreme Court in *People v. Carmony*, review granted May 21, 2003, S115090.

because his convictions for rape and kidnapping in that case arose from a single act. We recently held in *People v. Burgos* (2004) 117 Cal.App.4th 1209, 1215-1216 that a trial court abuses its discretion when it declines to strike one of two prior convictions where the two prior convictions are so closely connected as to have arisen from a single act. (See also *People v. Benson* (1998) 18 Cal.4th 24, 36, fn. 8 [leaving open the question of whether a trial court abuses its discretion by failing to strike one of two prior convictions when the convictions arise out of a single act].) The trial court here did not discuss the factual basis for those convictions, and it is unclear from the balance of the record whether the prior convictions in case No. BA048111 arose from a single act. But even assuming that it would have been appropriate to strike one of those convictions, we conclude the failure to do so must be deemed harmless. The trial court found true that appellant had sustained three prior serious felony convictions. Thus, even if it had stricken one of the prior convictions from case No. BA048111, the remaining two prior convictions were sufficient for the court to impose a 25-year-to-life sentence under the Three Strikes law. (§§ 667, subd. (e)(2)(A), 1170.12, subd. (c)(2)(A).) Moreover, the trial court's comments at sentencing demonstrate that whether appellant had suffered two or three prior serious felony convictions would not have affected the trial court's imposition of an indeterminate sentence.

2. Appellant's sentence does not constitute cruel and/or unusual punishment.

Appellant now claims that his 25-year-to-life sentence unconstitutionally amounts to cruel and/or unusual punishment.[5] The United States Constitution prohibits the imposition of cruel and unusual punishment (U.S. Const., 8th Amend.), and the

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[5] Appellant has waived this challenge by not raising it below. (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 27; *People v. Ross* (1994) 28 Cal.App.4th 1151, 1157, fn. 8.) "Nevertheless, in order to 'forestall a subsequent claim of ineffectiveness of counsel' [citation], we will consider the issue." (*People v. DeJesus*, at p. 27.)

California Constitution prohibits the imposition of cruel or unusual punishment (Cal. Const., art I, § 17). We find that appellant's sentence comports with the constitutional guarantees of both the federal and state Constitutions.

The Eighth Amendment to the United States Constitution proscribes "cruel and unusual punishment" and "contains a 'narrow proportionality principle' that 'applies to noncapital sentences'" and prohibits "'imposition of a sentence that is grossly disproportionate to the severity of the crime.'" (*Ewing v. California* (2003) 538 U.S. 11, 20-21 (lead opn. of O'Connor, J.).) In *Ewing*, the Supreme Court rejected an Eighth Amendment challenge to a 25-year-to-life sentence imposed under the Three Strikes law against an individual whose current offense was shoplifting three golf clubs and prior serious felony convictions were three burglaries and one robbery. (*Id*. at pp. 18-19.) The court affirmed the principle that recidivism may be a basis for increased punishment, explaining: "In imposing a three strikes sentence, the State's interest is not merely punishing the offense of conviction . . . '[i]t is in addition the interest . . . in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law.'" (*Id*. at p. 29; see also *United States v. Kaluna* (9th Cir. 1998) 192 F.3d 1188, 1199-1200 ["Because the [three-strikes] statute restricts its application to instances where both the defendants' primary and past convictions are 'serious violent felonies,' the Court's precedent makes it clear that Kaluna's punishment for bank robbery is not sufficiently disproportionate to contravene the Eighth Amendment"].) Recently, in *People v. Meeks* (2004) 117 Cal.App.4th 891, the appellate court relied on *Ewing* to reject an Eighth Amendment challenge to a 25-year-to-life sentence imposed against a defendant whose instant offense was a violation of section 290 and who had sustained prior convictions for violent serious felonies. Given that the sentences in *Ewing* and *Meeks* were held not to be grossly disproportionate to the severity of the crimes, we must conclude that, in view of

appellant's criminal history and his convictions in the instant case, his sentence was not unconstitutionally disproportionate under the Eighth Amendment.

The California Constitution proscribes cruel *or* unusual punishment. (Cal. Const., art I, § 17.) A punishment may violate the California Constitution if it is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn omitted.) In *In re Lynch*, the court described three "techniques" that courts have used to administer this rule: (1) an examination of the "nature of the offense and/or the offender, with particular regard to the degree of danger both present to society"; (2) a comparison of the challenged penalty with the prescribed punishments for more serious offenses in the same jurisdiction; and (3) "a comparison of the challenged penalty with the punishments prescribed for the *same offense* in *other jurisdictions* having an identical or similar constitutional provision." (*Id.* at pp. 425-427; *People v. Meeks*, *supra*, 117 Cal.App.4th at p. 902.)

Appellant has not argued that his sentence is disproportionate as compared either to sentences imposed for more serious offenses in California or to the punishment imposed for the same offense in other jurisdictions. We therefore confine our review to an examination of the nature of the offense and the offender. We note that "a defendant's history of recidivism, which is part of the nature of the offense and the offender, justifies harsh punishment." (*People v. Meeks*, *supra*, 117 Cal.App.4th at p. 902.) We find that appellant's history of violent felonies, coupled with his conviction for corporal injury to a spouse and failure to register as a sex offender in this case, justifies the term imposed. (See *id.* at pp. 902-903 [25-year-to-life sentence did not violate California Constitution where the defendant was convicted for failing to register as a sex offender and was previously convicted of offenses involving violent conduct]; *People v. Cooper* (1996) 43 Cal.App.4th 815, 825-826 [25-year-to-life sentence did not violate California Constitution where the defendant was convicted of being a convicted felon in possession of a handgun and was previously convicted of

offenses including robbery, theft and narcotics possession].) Appellant's sentence is therefore in conformance with the California Constitution.

DISPOSITION

The judgment is affirmed.

NOT FOR PUBLICATION.

_____, J.

DOI TODD

We concur:

_____, Acting P.J.

NOTT

_____, J.

ASHMANN-GERST